Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1123

ALBERT M. GONZALEZ, TERESA C. GONZALEZ, his wife, and the INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, an unincorporated association,

Petitioners,

vs.

NORTHWEST AIRLINES, INC., a corporation of the State of Minnesota, JAMES O. SINGER, JAMES A. ABBOTT, ROBERT EBERT and STEVEN D. WHEELER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

Citation to Opinion Below 1

Jurisdiction 2

The Question Presented 2

Constitutional and Statutory Provisions Involved 2

Statement of the Case 3

Reason for Granting the Writ 9

Conclusion 15

CASES CITED:

Andrews v. Louisville & Nashville R. Co.,
406 U.S. 320 (1972) 9

Garrity v. New Jersey,
385 U.S. 493 (1967) 11

Hines v. Anchor Motor Freight, Inc.,
424 U.S. 554 (1976) 13

Holodnak v. Avco Corp., Avco-Lycoming Div.,
Stratford,
514 F.2d 285 (2d Cir. 1975) 14

In re Murchison,
349 U.S. 133 (1955) 12

Local 453, International Union of Electrical,
Radio & Machine Workers v. Otis Elevator Co.,
201 F. Supp. 213 (E.D.N.Y. 1962) 14

Patrick v. Esso Standard Oil Company,
156 F. Supp. 336 (D.C. N.J. 1957) 13

Peper v. Princeton University Board of Trustees,
77 N.J. 55, 389 A.2d 465 (1978) 13

Perry v. Sindermann,
408 U.S. 593 (1972) 13

TABLE OF CONTENTS

CASES CITED:

Slochower v. Board of Higher Education, 350 U.S. 551 (1956) 11

Spevack v. Klein, 385 U.S. 511 (1967) 11

United States v. Kordel, 397 U.S. 1 (1970) 9

CODES CITED:

28 U.S.C., Section 1254(1) 2

45 U.S.C., Section 153, First (q) 2, 3, 7

APPENDIX

Appendix A
Award and Opinion of the NWA-IAMAW System Board of Adjustment dated January 17, 1977 .. A1

Appendix B
Oral Opinion of the District Court for the District of New Jersey rendered October 11, 1977 ..... B1

Appendix C
Order and Final Judgment of the District Court for the District of New Jersey dated December 6, 1977 C1

Appendix D
Judgment Order of the Court of Appeals for the Third Circuit dated October 10, 1978 and certified as formal mandate dated November 1, 1978 ..... D1

Appendix E
Excerpts from Section 153, First of the Railroad Labor Act, as Amended (45 U.S.C., Section 153, First) E1

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ALBERT M. GONZALEZ, TERESA C. GONZALEZ, his wife, and the INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, an unincorporated association,

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NORTHWEST AIRLINES, INC., a corporation of the State of Minnesota, JAMES O. SINGER, JAMES A. ABBOTT, ROBERT EBERT, and STEVEN D. WHEELER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Third Circut entered on October 10, 1978.

CITATION TO OPINIONS BELOW

The Award and Opinion of the NWA-IAMAW System Board of Adjustment (hereinafter "Board") dated January 17, 1977 is set forth in Appendix "A" to this Petition. The oral opinion rendered on October 11, 1977 by the District Court for the District of New Jersey in Civil Action No. 76-160, is set forth in Appendix "B".

The Order and Final Judgment of the District Court dated December 6, 1977, denying the application of petitioners to review, set aside and/or modify the monetary award of the Board is set forth in Appendix "C". The judgment order of the Court of Appeals for the Third Circuit dated October 10, 1978 in Docket No. 78-1171 and certified on November 1, 1978 as a formal mandate, which affirmed without opinion the Order and Final Judgment of the District Court, is set forth in Appendix "D".

JURISDICTION

The judgment order of the Third Circuit, printed in Appendix "D," was entered on October 10, 1978. On January 8, 1979, petitioners requested a fifteen day extension of time to file this petition. On January 11, 1979, the time to file this petition was extended by this Court to January 23, 1979. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1) and 45 U.S.C., Section 153, First (q).

THE QUESTION PRESENTED

Does it constitute a penalty for the exercise of constitutional rights protected by the Fifth Amendment when back pay awarded for a wrongful discharge is limited solely on the basis that the grievant sought and obtained an adjournment of arbitration proceedings until he was exonerated from liability in a parallel criminal action?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions involved are the self-incrimination and due process clauses of the Fifth Amendment of the United States Constitution. Pertinent excerpts of Section 153, First of the Railroad Labor Act, as amended (45 U.S.C., Section 153, First) are set forth in Appendix "E" to this Petition.

STATEMENT OF THE CASE

Petitioners are Albert M. Gonzalez ("AMG"), Teresa C. Gonzalez, his wife, and the International Association of Machinists & Aerospace Workers, AFL-CIO ("IAMAW").

In July, 1973, AMG was employed as a Crew Chief in the Plant Maintenance Department at the Newark Station of respondent Northwest Airlines, Inc. ("NWA"). AMG was a member of the IAMAW. In accordance with the collective bargaining agreement then in effect between NWA and the IAMAW, and commonly known as "the Mechanic's Agreement," the Board had exclusive jurisdiction over any grievance raising a claim of wrongful discharge of an IAMAW member.

Subsequent to a "hearing" conducted on July 27, 1973 by defendant James O. Singer ("Singer"), the Manager of the Newark Station, AMG was discharged as an employee of NWA. In a formal Notice of Discharge dated July 30, 1973, the discharge of AMG was justified as being the result of:

> "[M]isuse of company funds whereby you purchased automotive parts, supplies and tools that could not be used on Northwest Airlines' ground equipment, using Northwest Airlines' purchase orders to obtain such items."

On August 1, 1973, AMG duly grieved his discharge. In accordance with grievance procedures established by

the Mechanic's Agreement, a "third step" hearing was conducted on September 14, 1973 by Edward J. Neppl, Director of ground services for NWA. By letter dated October 23, 1973, Director Neppl denied the grievance of AMG stating he had been discharged "for expropriation of Company parts and supplies."

While the decision at the third step of the grievance procedure was pending, on September 20, 1973 a criminal complaint against AMG was filed by NWA. Signed by Singer, the complaint alleged in the period August, 1971 to May, 1973 AMG had received certain merchandise for his personal use and caused NWA to pay for same with intent to cheat and defraud his employer in the approximate amount of $610.99. These were the same set of facts on which NWA had justified its discharge of AMG.

On December 19, 1973, after AMG refused offers of NWA to resign rather than have his job record indicate he was "discharged," a hearing was scheduled before the Board for February 14, 1974.

Singer was the only witness to testify on behalf of NWA as complainant before the Essex County Grand Jury on January 21, 1974. Subsequent to the testimony of Singer, on January 31, 1974 AMG was indicted on charges of embezzlement from NWA of tools and auto parts having a value of $610.99 during the period August, 1971 through May, 1973.

By way of a written request dated February 6, 1974, IAMAW in conformity with the advise of counsel for AMG in the related criminal action sought and obtained an adjournment of the arbitration before the Board, *sine die* (*i.e.*, "without date"), until the conclusion of the related criminal action. Over the objection of NWA, adjournment was granted by the Board's neutral member, Chairman Burton B. Turkus, in a letter dated February 11, 1974.

After a two week trial, on September 19, 1975 AMG was found "not guilty" in the parallel criminal action. By letter to Chairman Turkus dated October 30, 1975, NWA advised: "All impediments for the scheduling of this matter for arbitration had been overcome."

In January, 1976, petitioners sought an order from the District Court for the District of New Jersey enjoining arbitration proceedings before the Board. The basis for this application was NWA had waived its right to have the matter arbitrated by its institution of the parallel criminal action which resulted in AMG being exonerated from charges he had expropriated NWA parts and supplies. Relief was sought in the form of immediate reinstatement of AMG as an employee of NWA.

After two hearings in March, 1976 before the Honorable Frederick B. Lacey, arbitration before the Board was ordered to proceed forthwith. AMG was denied immediate reinstatmentement. Arbitration proceedings commenced before the Board on May 3, 1976. The proceedings took place over a period of five days. The last formal hearing was held on May 24, 1976. There were a total of forty exhibits submitted by the parties. Depositions were also taken, the last one on June 7, 1976. Post arbitral briefs were requested of counsel for petitioners and NWA. They were submitted to the Board on August 25, 1976.

On December 30, 1976, petitioners again applied for an order from the District Court to reinstate AMG as an employee of NWA and to make a decision on AMG's claim of wrongful discharge. As the basis for the relief sought, petitioners cited the fact that under the Mechanic's Agreement the Board was required to issue its award within thirty days after submission of post arbitral briefs. After being advised of these applications, by letter dated January 4, 1977 Chairman Turkus advised petitioners he would render an award within two weeks.

On January 17, 1977, the Board rendered its Award which determined in pertinent part that:

> "[U]nder all the facts and circumstances involved and for the reasons set forth in the annexed Opinion, there was not just cause for the discharge of the grievant, Albert Gonzalez and said grievant as a consequence thereof should be and hereby is reinstated to employment on or before January 24, 1977 without loss of seniority. . ." Appendix "A" at page A1.

Although the Board had determined AMG had been wrongfully discharged, his award for back pay was limited to the period July 30, 1973 to March 15, 1974 "at straight time pay less interim earnings and/or other valid offsets if any during said period."

In the Opinion, Chairman Turkus stated his grounds for limiting the monetary award to AMG as follows:

> "Had the grievant proceeded to arbitral hearing on February 14, 1974 as duly scheduled by the parties, the entire hearing at that time could have been completed in a single day of hearing and the grievant on the basis of Union Exhibit 18 would have been reinstated to employment with two or three weeks with full back pay less any interim earnings or valid offset" [1] Appendix "A" at page A13.

Chairman Turkus thereafter rejected the contention of petitioners that to limit the back pay award would be a penalty for seeking to protect a Fifth Amendment right against self-incrimination by adjournment of the arbitral proceedings originally scheduled for February 14, 1974:

1. "Union Exhibit 18" referred to in the Opinion is a transcript of a tape of the "hearing" conducted on Friday July 27, 1978 by Singer. It was based on an analysis of this transcript that Chairman Turkus determined that the discharge of AMG on July 30, 1973 by NWA was "not for just cause." Union Exhibit 18 was not prepared even in rough form until September, 1975. The final revision of the transcript identified as "Union Exhibit 18" at hearings before the Board was obtained in February, 1976.

> "Grievant, in conformity with the advice of his separate legal counsel, demanded and received the adjournment of the duly scheduled arbitration hearing of February 14, 1974 *since die* until the criminal charges lodged against grievant were concluded. No one can fault the grievant for wisely avoiding an arbitral hearing *and the possibility of his testimony at the arbitration being used against him in the criminal case*—but grievant cannot profit thereby at the expense of his employer who was ready to proceed with the arbitration. Indeed, it is a basic precept in arbitration that a grievant is affirmatively required to minimize damages—not increase it by self-interest, inordinate delay." (Emphasis added.) Appendix "A" at pages A13-A14.

In lieu of a petition pursuant to Section 153, First (q) of the Railroad Labor Act, as amended, (45 U.S.C., Section 153, First (q)), on April 18, 1977 petitioners filed motions in the pending litigation before the District Court, *inter alia*, to set aside and/modify the monetary award made by the Board to AMG, and for a determination AMG should have been awarded net back pay equal to gross wage and benefits earned by an employee of NWA in the same job classification directly below AMG on the seniority roster less wages earned and unemployment compensation paid to AMG for the period July 30, 1973 through January 24, 1977, together with prejudgment interest and an award of attorney's fees.

After an extensive exchange of briefs, affidavits and other pleadings, the motions of petitioners were argued before the Honorable James A. Coolahan on October 11, 1977. Subsequent to oral argument of counsel, the District Court rendered its opinion on the record denying the relief sought by petitioners.

On December 6, 1977 a formal Order and Final Judgment incorporating the oral opinion and setting forth rulings of the District Court was entered.

A Notice of Appeal invoking the jurisdiction of the Third Circuit was filed by petitioners on January 5, 1978.

Subsequent to filing an appendix and briefs and hearing oral argument on October 6, 1978, the Third Circuit rendered its judgment order dated October 10, 1978 affirming without opinion the Order and Final Judgment of the District Court.

REASON FOR GRANTING THE WRIT

This petition raises a substantial and important question concerning the conflict inherent in the exercise or protection of constitutional rights with the concept of speedy and economical justice that is the rationale for mandatory arbitration of labor disputes. There is no reported decision on point although arbitration of discharge matters involving alleged criminal conduct number in the thousands each year. Certification of the question presented has particular importance since this Court held it is mandatory that all claims of wrongful discharge coming under the Railroad Labor Act be arbitrated and cannot be relitigated on the merits in an independent judicial proceeding. *Andrews v. Louisville & Nashville R. Co.*, 406 U.S. 320 (1972).

The constitutional rights of employees such as AMG and concepts of due process inherent in the prosecution of a grievance by a union member before a labor tribunal such as the Board have been seriously jeopardized by the Opinion of Chairman Turkus and its subsequent affirmance by the District Court and the Third Circuit. The Opinion and its affirmance stand as approval of imposition of an automatic penalty by an employer on an employee for successfully seeking to protect his Fifth Amendment privilege against self-incrimination when there were arbitration and criminal proceedings pending involving the exact same factual circumstances.

It is also submitted that the question presented should be certified to correct a serious misinterpretation by the lower courts of the scope of this Court's opinion in *United States v. Kordel*, 397 U.S. 1 (1970) where it was held a vice-president of a corporation who answered government interrogatories in a civil proceeding involving quantities of allegedly misbranded products had the right to invoke his

Fifth Amendment privilege against compulsory self-incrimination by refusing to answer interrogatories. Once having failed to do so, however, this Court held he could not subsequently assert he had been compelled to give testimony against himself in the interrogatories as grounds for overturning a criminal conviction. As stated by Justice Stewart:

> "Overturning these convictions would be tantamount to the adoption of a rule that the Government's use of interrogatories directed against a corporate defendant in the ordinary course of a civil proceeding would always immunize the corporations' officers from subsequent criminal prosecution. *The Court of Appeals was correct in stating that 'the Government may not use evidence against a defendant in a criminal case which has been coerced from him under penalty of either giving the evidence or suffering a forfeiture of his property.'* But on this record there was no such violation of the Constitution, and no such departure from the proper administration of criminal justice." (Emphasis added.) 397 U.S. at pages 12-13.

The decision in *Kordel* was clearly limited to the factual situation where the defendant had voluntarily waived his Fifth Amendment right to remain silent. It has no application to this matter where petitioners only "wisely" sought to avoid a waiver of constitutional rights such as occurred in *Kordel* by obtaining an adjournment of arbitration before the Board pending the outcome of a parallel criminal action initiated by NWA as complainant.

Based on the District Court's opinion upholding the Board's limitation of the back pay award to AMG, and its affirmance by the Third Circuit, *Kordel* is being erroneously cited as authority for the proposition that it does *not* constitute a penalty or forfeiture of a constitutional right to limit a back pay award solely on the basis the grievant

sought and obtained a postponement of arbitration proceedings initiated to protect his property right to employment and its attendant wage and welfare benefits in circumstances where a wrongful discharge was claimed and a parallel criminal action was thereafter instituted.

This misinterpretation of *Kordel* by the lower courts strikes at the very heart of Anglo-American jurisprudence. Neither the Board nor an employer should be permitted to automatically impose on an employee the penalty of limiting back pay for successfully obtaining adjournment of arbitration proceedings for the purpose of protecting his Fifth Amendment right against self-incrimination and to insure due process of his grievance for wrongful discharge. This Court has prohibited such automatic sanctions. See *Garrity v. New Jersey*, 385 U.S. 493 (1967); *Spevack v. Klein*, 385 U.S. 511 (1967).

A employee such as AMG who seeks to protect his privilege against self-incrimination may have a reasonable fear of employer initiated criminal prosecution and yet be innocent of any wrongdoing. The Fifth Amendment also serves to protect those who otherwise might be ensnared by ambiguous circumstances. *Slochower v. Board of Higher Education*, 350 U.S. 551 (1956).

In proceedings before the Board, the employer is usually represented by corporate counsel and the employee usually by a union agent untrained in law. There often develops ensnaring and ambiguous circumstances where an employee will not always understand that he is voluntarily giving up a constitutional right by his testimony. The Board has no formal rules of procedure to compel discovery of testimony or documents. If a discharge matter is heard prior to a criminal trial dealing with the same set of facts there is great danger that the cherished Fifth Amendment privilege against self-incrimination will be voluntarily waived by the need for the employee to testify

to refute evidence offered by his employer with respect to which there has been no discovery.

Due process requires fundamental fairness. *In re Murchison*, 349 U.S. 133 (1955). As this Court recognized in *Kordel*, federal courts have often deferred civil proceedings pending the completion of parallel criminal actions when required by the interests of justice. 397 U.S. at page 13, footnote 27. In this matter, the Board recognized the obvious prejudice to the constitutional rights of AMG by postponing arbitration *sine die* until completion of the parallel criminal action initiated by NWA. After the exoneration of AMG, however, a penalty was imposed for petitioners having sought and obtained the adjournment by limiting the back pay award to the seven month period within which Chairman Turkus irrationally opined the arbitration of AMG's grievance would have concluded with an award of reinstatement if it had been heard as originally scheduled on February 14, 1974.[2]

The inequitable nature of the Opinion of Chairman Turkus is echoed by Judge Coolahan in his oral opinion when he concluded:

> "Since (AMG) could have asserted his Fifth Amendment rights in the arbitration . . . there was of course no constitutional right to have the proceeding postponed . . . until the completion of the criminal proceeding, so the delay, therefore, certainly should be charged against (AMG) because (AMG) would not have automatically lost in the arbitration proceedings if he had asserted his Fifth Amendment rights." Appendix "B" at page B4.

What is at issue in this matter is not whether the Board should have postponed the arbitration proceedings pending the outcome of the parallel criminal action, but

2. Eliminating the period of adjournment between February 14, 1974 and May 3, 1976, the arbitration of AMG's grievance actually took fifteen months. The total time lost by AMG as an employee of NWA was forty-two months.

can it constitutionally impose a penalty on AMG for having done so? If the Award and Opinion of the Board is allowed to stand, it will have a chilling effect on the ability of employees to protect their property rights in employment. As this Court and other courts have increasingly recognized, in our modern society the right to employment in a particular job with seniority and attendant wage and welfare benefits has taken on a constitutional dimension. See *Perry v. Sindermann*, 408 U.S. 593 (1972); see also *Patrick v. Esso Standard Oil Company*, 156 F. Supp. 336 (D.C. N.J. 1957); *Peper v. Princeton University Board of Trustees*, 77 N.J. 55, 389 A.2d 465 (1978).

If the Award and Opinion of the Board is allowed to stand, it also will have a chilling effect on the ability of collective bargaining representatives such as IAMAW to protect the property rights of its members when an employer can effectively limit back pay awards under exclusive arbitration procedures by simply filing a parallel criminal complaint in a discharge matter while a grievance is pending. A union representative will be thereby coerced into curtailing investigations of serious discharge cases involving criminal allegations on the basis that any adjournment of the original hearing date of arbitration automatically cuts off back pay claims. The high responsibility of bargaining representatives to do an effective investigation in discharge matters involving possible criminal allegations has recently been commented upon by this Court. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976).

The importance of the due process issues raised by this petition is further underlined by the fact that if AMG had been convicted as a consequence of the criminal complaint filed by NWA, any subsequent arbitration proceedings before the Board would have been moot. Under fundamental and fair concepts of due process, an arbitra-

tion award reinstating an employee found guilty of criminal activity on his employer's premises is against public policy and cannot be enforced. *Local 453, International Union of Electrical, Radio & Machine Workers v. Otis Elevator Co.*, 201 F. Supp. 213 (E.D.N.Y. 1962).

This case should establish as a countervailing concept of due process, if not elemental fairness, that when criminal charges are filed against an employee based on the same set of facts for which he was discharged, his employer should be required to pay the full amount of back pay lost even if in the exercise of constitutional rights protected by the Fifth Amendment arbitration proceedings are postponed pending a "not guilty" outcome of the parallel criminal action. It would be a result consistent with the recent holding of the Second Circuit that where constitutional rights are violated in the context of a wrongful discharge the only appropriate remedy is an award of full back pay, prejudgment interest and attorney's fees to assure that the employee is made economically whole. *Holodnak v. Avco Corp., Avco-Lycoming Div., Stratford*, 514 F.2d 285 (2nd Cir. 1975).

Since the lower courts have repudiated the appropriate standards to be applied when an employee grieving a discharge seeks relief from a penalty automatically imposed for having successfully sought to exercise or protect constitutional rights guaranteed by the Fifth Amendment, it is respectfully submitted that this Court in the exercise of its supervisory powers should grant certiorari of the question presented in order to establish the priority of constitutional rights where there is a conflict with mandatory arbitration procedures under the Railroad Labor Act.

CONCLUSION

For the foregoing reasons, petitioners respectfully request this petition for a writ of certiorari be granted.

Respectfully submitted,

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DATED: January 12, 1979.

APPENDIX A

NWA-IAMAW SYSTEM BOARD OF ADJUSTMENT

IN THE MATTER OF THE ARBITRATION

between

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, NORTHWEST DISTRICT LODGE NO. 143

and

NORTHWEST AIRLINES, INC.
(Re: Albert Gonzalez: Gr. No. 10394: Dkt No. 73-22)

AWARD

The undersigned, duly constituting the NWA-IAMAW System Board of Adjustment in this matter, having duly heard the proofs, allegations and contentions of the parties and after due consideration and deliberation with respect thereto, hereby find, decide, determine and render the following

AWARD

In the setting and under all the facts and circumstances involved and for the reasons set forth in the annexed Opinion there was not just cause for the discharge of the grievant, Albert Gonzalez, and said grievant as a consequence thereof should be and hereby is reinstated to employment on or before January 24, 1977 without loss of seniority which shall be adjusted accordingly together with

back pay from July 30, 1973 to March 15, 1974 at straight time pay less interim earnings and/or other valid offsets if any during said period payable within 20 days from date hereof; and Company records shall be duly corrected in accordance with this decision.

Dated: January 17, 1977.

/s/ Burton B. Turkus
BURTON B. TURKUS,
Chairman

/s/ LeRoy Hesner
LEROY HESNER, Union Board, concurring except as to the limitation of back pay to which he dissents.

/s/ Christopher Wendt
CHRISTOPHER WENDT, Company Board Member, dissenting except as to the limitation of back pay to which he concurs.

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss:

On this 17th day of January, 1977, before me personally came and appeared BURTON B. TURKUS, to me known and known to me to be the individual described in and who executed the foregoing instrument and he duly acknowledged to me that he executed the same.

NOTARIZED

COUNTY OF NEW YORK)
STATE OF NEW YORK) ss:

On this 17th day of January, 1977, before me personally came and appeared CHRISTOPHER WENDT, to me known and known to me to be the individual described in and who executed the foregoing instrument and he duly acknowledged to me that he executed the same.

NOTARIZED

COUNTY OF NEW YORK)
STATE OF NEW YORK) ss:

On this 17th day of January, 1977, before me personally came and appeared LEROY HESNER, to me known and known to me to be the individual described in and who executed the foregoing instrument and he duly acknowledged to me that he executed the same.

NOTARIZED

NWA-IAMAW SYSTEM BOARD OF ADJUSTMENT

IN THE MATTER OF THE ARBITRATION

between

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, NORTHWEST DISTRICT LODGE NO. 143

and

NORTHWEST AIRLINES, INC.
(Re: Albert Gonzalez: Gr. No. 10394: Dkt. No. 73-22)

The grievant, Albert Gonzalez, Plant Maintenance Crew Chief at the Company's Newark facility, began work in that capacity in June 1971. Prior thereto he had been a Plant Maintenance Mechanic at the Company's JFK station.

On July 30, 1973, grievant was discharged. The Notice of Discharge, signed by the Newark District Manager—Transportation Services, James Singer, stated that his dismissal was for the following cause:

> "The result of your misuse of company funds whereby you purchased automotive parts, supplies and tools that could not be used on Northwest Airlines' ground equipment, using Northwest Airlines' purchase orders to obtain such items."

On August 1, 1973, the discharge was duly grieved and processed to arbitration with the hearing initially scheduled by the parties on December 19, 1973 to proceed on February 14, 1974. However, on February 6, 1974, the Union at the request of the grievant in conformity with the advice of his separate legal counsel demanded and secured an adjournment of the arbitral hearing *sine die* until the conclusion of the criminal charges brought against the grievant were concluded.

On October 30, 1975 the Company, by letter to the chairman, advised the System Board of Arbitration that all impediments for the scheduling of this matter for arbitration have been overcome. Although the grievant had been found "not guilty" after a two week trial, the scheduling of the arbitration hearing, however, was further delayed by virtue of an action instituted by Gonzalez and the Union in the Federal District Court for the District of New Jersey in which, *inter alia* an injunction against the arbitral hearing was sought on the ground that the Company had waived its right to have the matter arbitrated and for the grievant's immediate reinstatement to employment.

After arbitration had been ordered by the Honorable Frederick B. Lacey, there was a question whether the neutral member of the Board should be chosen from its panel of arbitrators which the parties (Company and Union) had initially agreed upon (in December, 1973). Judge Lacey ruled that the question of arbitrators should be agreed upon between the parties. Thereafter, the Union agreed to proceed with the arbitration with the membership of the Board as presently constituted.

The date ultimately finalized for the commencement of the arbitral hearing after the proceedings in the Federal District Court was May 3, 1976. It was agreed by counsel at the outset of the arbitral hearing that the submission of

the case to arbitration was without prejudice to the claims raised in the lawsuit that the grievant has against the Company presently pending in the Federal District Court in New Jersey.

The record with respect to this arbitration has been conservatively described in the Post Arbitration Brief of the grievant dated August 25, 1976, consisting of 46 pages with some 50 pages of appendices as "voluminous." The Post Hearing Memorandum on Behalf of the Company is confined to 20 pages "in the interests of brevity."

Suffice it to record that the arbitration proceedings consumed five full days of hearings—May 3, 4, 20, 21 and 24, 1976. There were 13 witnesses who testified—some of whom testified on at least 3 separate occasions. The transcript of the proceedings aggregates 836 pages.

During the course thereof, the Company submitted 22 separate exhibits including but not limited to transcripts of taped conversations between the parties and excerpts from the criminal proceedings, State of New Jersey v. Albert M. Gonzalez, Indictment No. 1777-73, Essex County Court to which frequent reference was made. The Union submitted 18 exhibits. In addition thereto, with consent of counsel for both sides depositions of witnesses which were taken May 13, 1976 and June 7, 1976 outside the presence of the Board were also received in evidence—the transcript of which totals 131 pages.

Following the submission of briefs on August 25, 1976, the time for which was extended several times to said date for the convenience and at the request of counsel, the Executive Session of this System Board of Arbitration was held on November 17, 1976 at which time there was a full and complete discussion of the salient elements of the controversy as viewed by each of the members.

As plaintively stated in the Post Arbitration Brief of the grievant, "a record of such voluminous nature is difficult to organize into a coherent presentation." Indeed an attempt to logically discuss the multitudiness factual and other differences argued ad infinitum would produce an opus of unparalleled prolixity. Rather, it is my intention to concentrate upon the facts which are controlling and decisive of this contested discharge.

The proof establishes that neither Station Manager Singer nor the other managers who supervised grievant and other plant maintenance employees had any mechanical knowledge or ability. Singer's dominant if not sole interest or concern in checking or policing the ordering practices in connection with the motor vehicle repair materials account was that the total over-all figure fell within the parameters of the budget.

Singer was not concerned about individual items so long as the total was within the budget. As a result the managers became lax to the point of gross mismanagement in checking or policing ordering practices—approving purchase orders which stated no specific usage, failed to disclose prices or the specific items purchased.

Station Manager Singer frequently signed the check prepared by his secretary without looking at the purchase order or bill or if he looked at all, it was only to see if it had been signed by the first-line Service Manager and in at least one such purchase order Singer actually paid an invoice which the first-line Service Manager had not even approved.

The inevitable result of such managerial ineptness and patently inexcusable negligence in the policing of purchase orders was a mounting series of improper purchases of automotive parts, supplies and tools for use other than on the

Company's ground equipment (intermingled with legitimate ones) via Company purchase orders and the concomitant misuse of Company funds in obtaining such items —which was finally unearthed by a Company auditor in a painstaking analysis of purchase orders and invoices as well as an inventory of existing supplies, parts and tools.

In connection with the audit and inventory, the inquiries he made of various plant maintenance employees, it became a matter of common knowledge to all that an investigation was under way and that everyone on all levels of authority in ordering, approving or countenancing the illegitimate purchases of automotive parts, supplies or tools would be questioned in regard thereto.

It appears from Union Exhibit 18, a transcript of a taped-recorded hearing at the office of James O. Singer, Station Manager of Northwest Airlines, Inc., at the Newark International Airport, Newark, New Jersey, on or about Friday, July 27, 1973, with James O. Singer, Frank O'Grady (the recent successor to the prior front-line Service Manager), Gary Nelson (Company Auditor) and Albert M. Gonzalez (Grievant) that Singer on the basis of the evidence uncovered by the auditor, had determined before the meeting to discharge grievant.

The hard and inescapable fact is that instead of discharging grievant as he had intended and despite full knowledge of grievant's misconduct (including grievant's signing purchase orders for both automotive parts which could not be used on Company's ground equipment and for grievant's improper purchase of tools in contravention of Article XXI Section F of the labor contract). Station Manager Singer nonetheless determined in the course of the hearing and openly acknowledged and declared that grievant did not deserve to be discharged or even be required to resign (which grievant initially requested he be

allowed to do), stating *inter alia*, "We don't want to get you out, Al—I don't really think you're involved in this. This is a lot of stupidity signing for this junk and you know it." *

Union Exhibit 18 is the 82 page certified transcript of the tape recording of that session which tape was presented to Betty J. MacKenzie, a Certified Shorthand Reporter and Notary Public of the State of New Jersey, by grievant's attorney for transcription.

It is made graphically clear in Union Exhibit 18 that Station Manager Singer was primarily concerned with (a) allaying grievant's repeatedly expressed fear of physical injury to his family—which grievant asserted had been twice threatened "if he did not keep his mouth shut"—and (b) for grievant to cooperate with the Company and law enforcement authorities in getting rid of the real miscreants including the saboteur who grievant avowed had actually exploded an engine in grievant's face after grievant had completed its overhaul.

In endeavoring to calm or relieve grievant's fear of reprisals should he cooperate, Singer stressed that these were idle threats that "they didn't do anything to you the last time when you came over" (apparently referring to grievant's reminder to Singer during the session of grievant's cooperation with the Company during the strike); the availability of police protection; and that instead of grievant returning to work in the Newark station the prospect of a transfer to another station such as but not necessarily Miami was a possibility if grievant so desired.

* In so determining, Station Manager Singer made it clear that grievant would be expected and required to reimburse the Company for the cost of these items.

In the course of that phase of their discussion, grievant alluded to the early 30's (the lawless era of organized crime contract assassinations) and stated "there's a lot of people involved, even people on the outside, so I don't want to get involved." At a later point, with regard thereto, grievant stated, "I will try to cooperate but I got to think, see what I have to do" and made it unmistakenly clear that the safety of his family was paramount in arriving at his ultimate decision. Indeed, grievant made absolutely no commitment or promise to cooperate—merely to think about it.

Nonetheless, Station Manager Singer concluded that Friday, July 27, 1973 meeting without in anywise watering down his expressed determination that grievant did not deserve discharge or should even be required to resign but to the contrary buttressed that determination with his final and reassuring statement (previously cited) to wit, "We don't want to get you out, Al—I don't really think you're involved in this. This is a lot of stupidity signing for this junk—and you know it."

(End of Tape)

Although grievant visited with Singer at Singer's home during that weekend and the two of them then went to a bowling alley to meet with a Union steward in whose integrity grievant had professed confidence during the taped session on Friday, grievant finally decided not to cooperate and was discharged from employment the following Monday, July 30, 1973 (as previously cited on page 1 hereof) for the following cause:

> "The result of your misuse of company funds whereby you purchased automotive parts, supplies and tools that could not be used on Northwest Airlines' ground equipment using Northwest Airlines' purchase orders to obtain such items."

But the Company with full knowledge of the nature and degree of grievant's involvement therein had determined that his discharge was not warranted. *A fortiori,* grievant's discharge was patently the product of his failure to cooperate. It is unmistakenly clear, moreover, that this System Board of Adjustment is thus being urged to find just cause for a discharge which the Company itself had determined was neither warranted nor indicated on July 27, 1973.

Indeed, in the light thereof, a knotty problem is posed as to whether the doctrine of equitable estoppel precluding the Company from asserting just cause for the discharge under all the circumstances is properly applicable. In any event, as the neutral member I cannot find just cause for the discharge of the grievant on July 30, 1973 when the Company itself with full knowledge of the nature and degree of grievant's misconduct determined on July 27, 1973 that discharge was unduly harsh and severe and neither indicated nor warranted under all the facts and circumstances involved.

Ironically enough, grievant at the arbitration hearing, whether wittingly or not, actually sought to destroy the cogency, vitality and admissibility of Union Exhibit 18 which in fact provides the sole and exclusive controlling and decisive ground or basis for the Board's determination that there was not just cause for the grievant's discharge.

For example, grievant flatly denied knowing that the Friday, July 23, 1973 session was being tape recorded despite the fact that the reliable, accurate and credible proof establishes with convincing finality that the recorder was at all times on the top of the conference table patently visible to the grievant and all others who were talking.

In addition, grievant claimed that during the course of the tape recorded session he was refused the opportunity

of Union representation. The fact is that no such refusal occurred. Actually, grievant by his own admission was no novice in grievance procedure and well knew his rights as to representation signally refrained from asking any Union Steward or official to accompany or represent him at the meeting.

Indeed and in fact, as a reading of Union Exhibit 18 will conclusively establish, grievant was in full command and control of the July 27, 1973 session from start to finish. It is unmistakenly clear, moreover, that grievant needed no Union representation and wanted none since he was shrewdly appraising all his options—one of which was Company cooperation to save his job. The very fact that grievant had already received two threats of reprisal if "he did not keep his mouth shut" is rather persuasive that others involved either knew from him that he did not intend to be a scapegoat for them or suspected that grievant contemplated such action.

As the first 33 pages of Union Exhibit 18 will reveal, grievant succeeded in getting an oral bill of particulars of the Company's proof of his involvement in the purchase of automotive parts and sundry supplies and tools. As to the latter, i.e., the tool items he insisted were in replacement of his own tools which had been stolen and that the replacement tools were still at the Newark station.

At this juncture of the meeting, Station Manager Singer declared, "We're going to have to discharge you." To which grievant replied, "Don't, Jim." and when Singer said, "I'm serious" grievant queried, "Why can't you get me a resign—I resign. See, I got a family. You know that. Give me the stuff. I resign. You know what I got on my shoulders, right?"

From that point forward, grievant, *inter alia,* revealed that he had been threatened not to take the job of Plant

Maintenance Crew Chief in Newark; that he had been "roughed up" on the job; that he was in reality a veritable "fall guy" in connection with the purchase orders and neither stole nor profited thereby.

Indeed, as Union Exhibit 18—which by reference is made a part of this opinion without the actual annexation of its 82 pages—will dramatically reveal, grievant succeeded in having Station Manager Singer record on the tape that grievant did not deserve discharge nor should even be required to resign albeit making no definite commitment or promise to cooperate with the Company and/or law enforcement authorities.

Throughout the entire 82 pages of discussion, grievant did not reveal the name of a single culprit or saboteur and when any name was suggested gave no indication whether that individual was or was not involved. In reading Union Exhibit 18, the conclusion is irresistible that grievant from start to finish knew that the session was being taped and recorded and that no valid basis existed for its exclusion and the Board so finds.

The Board having decided by a majority vote of its members that the discharge was not for just cause for the reasons stated in preceding paragraphs of this opinion, now turns to the question of the back pay, if any, which should be awarded grievant.

Had the grievant proceeded to arbitral hearing on February 14, 1974 as duly scheduled by the parties, the entire hearing at that time could have been completed in a single day of hearing and the grievant on the basis of Union Exhibit 18 would have been reinstated to employment within two to three weeks with full back pay less any interim earnings or valid offset.

Grievant, in conformity with the advice of his separate legal counsel, demanded and received the adjournment

of the duly scheduled arbitration hearing of February 14, 1974 *sine die* until the criminal charges lodged against grievant were concluded. No one can fault grievant for wisely avoiding an arbitral hearing and the possibility of his testimony at the arbitration being used against him in the criminal case—but grievant cannot profit thereby at the expense of his employer who was ready to proceed with the arbitration. Indeed, it is a basic precept in arbitration that a grievant is affirmatively required to minimize damages—not increase it by self-interest, inordinate delay.

As stated on page 2 of this opinion, the arbitral hearing was further delayed after the grievant had been found not guilty of the criminal charges by virtue of an action instituted by grievant and the Union for an injunction against the arbitration hearing on the ground that the Company had waived its right to have the matter arbitrated.

After the Court had ordered arbitration, the question arose as to whether the neutral member of the Board should be chosen from the panel of arbitrators which the Company and Union had initially agreed upon in December, 1973. The Court ruled that the question of arbitrators should be agreed upon by the parties. The Union agreed to proceed with the arbitration with its membership as presently constituted. The date ultimately finalized therefor was May 3, 1976. After a series of hearings and the taking of depositions, post hearing briefs were exchanged on August 25th and the Board of Arbitration held its initial Executive Session on November 17, 1976 and the decision herein issued two months later.

The Board at least by majority vote has decided that the unduly excessive delay here encountered cannot be attributed nor justly charged against the Company. Indeed, to do so would be tantamount to the imposition of punitive damages—rarely invoked in arbitration, and in some states such as New York is precluded on the ground that arbitrators do not have the power to award punitive damages. See e.g., Garrity v. Lyle Stuart, 386 N.Y.S.2d 831, 40 N.Y.2d 354, 353 N.E.2d 793 (New York Court of Appeals 1976) in reversing the lower court, vacated the award of punitive damages and affirmed the remainder of the award.

Accordingly, in all fairness, the back pay award to the grievant should be limited and confined to its period from the date of discharge, July 30, 1973 to March 15, 1974 (the date by which the arbitration could have been decided had it proceeded to hearing on the date scheduled therefor) at straight time pay less interim earnings and/or other valid offset, if any, during said period.

It follows that the award annexed should issue.

Dated: January 17, 1977.

/s/ Burton B. Turkus
BURTON B. TURKUS

APPENDIX B

ORAL OPINION OF THE DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY RENDERED OCTOBER 11, 1977 AT PAGES 44-49 OF THE TRANSCRIPT OF THE RECORD OF THE PROCEEDINGS IN THE CASE ENTITLED

ALBERT M. GONZALEZ, TERESA C. GONZALEZ, his wife, and the INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,
an unincorporated association,
Plaintiffs,

vs.

NORTHWEST AIRLINES, INC.,
a corporation of the State of Minnesota,
JAMES O. SINGER, JAMES A. ABBOTT,
ROBERT EBERT, and STEVEN D. WHEELER,
Defendants.

(Civil No. 76-160, D. of N.J.)

THE COURT: Well, Gentlemen, I have reviewed this thoroughly, but I must say I didn't know there was a separate case. As I said, it came down from Judge Lacey, and all I was concerned with was this motion wherein this plaintiff seeks to set aside an arbitrary award made before Burton Turkus, claiming that the award as made by the Arbitrator was arbitrary and capricious and without foundation in reason or fact, or it violated the plaintiff's Fifth Amendment rights.

After the hearing the Arbitrator limited the back pay recovery for the plaintiff for a period of time from discharge until, on July 30, 1973, to the date of March 15,

1974. The final award of the Arbitrator in favor of the plaintiff was January 19, 1977, but of course, as I said, the Arbitrator did not grant back pay to that date because it was the opinion of the Arbitrator that the plaintiff himself was responsible for the delay of the arbitration process from March 15, 1974, to January, 1977, and therefore, as I stated, the Arbitrator, the Board agreement statement limited it to the back pay of March 15, 1974. In his opinion, the Arbitrator ruled that the delay was fairly attributable to the plaintiff since the plaintiff had asked for a postponement of the arbitration hearing which had been set and which all parties were present at, because at that time there was pending against him criminal proceedings for the same matters which were involved in the arbitration proceedings.

The Arbitrator stated in his opinion, but for this delay requested by the plaintiff, the arbitration hearing would have taken about a-day and a decision would have been rendered in about three weeks.

Now, the plaintiff claims, of course, that the delay in the arbitration process should properly be charged to the employer since the employer had pressed criminal charges, or at least had actively engaged or aided in his criminal prosecution which ultimately led to an acquittal on his part.

After the hearing, as I stated before, the plaintiff then came into this Court before Judge Lacey and sought to enjoin arbitration subsequent to the acquittal and to reinstate the plaintiff, and he also sought to challenge the composition of the Arbitration Board. After a hearing, Judge Lacey gave an opinion that there was no reason for the relief that the plaintiff sought and denied such relief. The Arbitrator held that such delay was also chargeable to the plaintiff.

The plaintiff challenges this as unfair, and the plaintiff asserts that it had a right and was proper to apply to this Court for such relief. Certain suggestions were made by Judge Lacey which, of course, did not come into fruition.

The defendant, of course, is of the opinion that the award made by the Arbitrator cannot be set aside, if merely unfair or wrong, but only if it is found to be absolutely without basis in reason or fact, and this strict standard clearly applies because of the strong policy favoring finality in all arbitration rewards.

Now, the plaintiff further asserts that the award has violated his due process because the Arbitrator allows the plaintiff's requested postponement, and that he should not be prejudiced for this ruling. The plaintiff claims that the defendant pressed for a ruling, that is on the extension, but he asked for that because of the pending criminal proceedings. The defendant states that the plaintiff did not press the issue at that time, after learning of the defendant's position. The defendant admits that it probably would have been improper for the Arbitrator to have made a ruling at that time before hearing all of the evidence.

Now, the plaintiff also claims that his Fifth Amendment rights were violated. He is stating that if the adjournment originally asked by the plaintiff had not been granted, such would have violated his Fifth Amendment rights to stand silent regarding matters which are the subject of the criminal proceedings against him. In other words, the plaintiff asserts that it is unconstitutional to penalize him for assessing his Fifth Amendment rights.

Now, I think *United States against Corbell,* (sic) (*United States v. Kordel,* 397 U.S. 1 (1970)) which defendant counsel mentioned, and the Third Circuit case

of *DeVito v. Sills* (sic) (*DeVita v. Sills*, 422 F.2d 1172 (3rd Cir. 1970)) makes it abundantly clear that there is no constitutional right to be relieved of the burden of choosing to testify in the civil proceeding or to assert one's Fifth Amendment rights. Since the plaintiff could have asserted his Fifth Amendment rights in the arbitration process should the occasion have presented itself, there of course was no constitutional right to have the proceeding postponed under that charge until the completion of the criminal proceeding, so the delay, therefore, certainly should be charged against the plaintiff because the plaintiff would not have automatically lost in the arbitration proceedings if he had asserted his Fifth Amendment rights.

I feel, Gentlemen, that under the circumstances in this case, that the delay in the finalizing of the arbitration was certainly not on the part of the defendant, but certainly was on the part of the plaintiff. He is the one who sought to delay. He is the one who insisted upon the delay. He is the one who came into this Court to even cause further delay after his acquittal, and therefore, I must deny this motion at this time.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action File No. 76-160

ALBERT M. GONALEZ, TERESA C. GONZALEZ, his wife, and the INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, an unicorporated association,

Plaintiffs,

vs.

NORTHWEST AIRLINES, INC., a corporation of the State of Minnesota, JAMES O. SINGER, JAMES A. ABBOTT, ROBERT EBERT and STEVEN D. WHEELER,

Defendants.

ORDER AND FINAL JUGMENT
(Filed December 6, 1977)

This matter having been opened to the Court on the motion of Robert H. Jaffe, P.A., attorneys for the plaintiffs (Robert H. Jaffe, Esq. appearing) making application for the following relief: (a) to set aside and/or modify that portion of the award dated January 17, 1977 of the NWA-IAMAW System Board of Adjustment ("Board") which limited the monetary award for net compensation lost by plaintiff Albert M. Gonzalez ("Gonzalez") arising out of his wrongful discharge to the period July 30, 1973 to March 15, 1974, (b) for a determination that the appropriate monetary award that should be granted to plaintiff Gonzalez would be compensation equal to gross wage and other wage and

welfare benefits earned by an employee of defendants Northwest Airlines, Inc. ("Northwest") in the same job classification directly below plaintiff Gonzalez on the seniority roster of defendant Northwest net of wages and unemployment compensation paid to plaintiff Gonzalez for the period July 30, 1973 through January 24, 1977 and (c) an award of prejudgment interest on the monetary award to plaintiff Gonzalez as finally determined by this Court, together with reasonable attorney's fees; and the Court having considered the record of the arbitration proceedings conducted by the Board and filed with the Court in accordance with the provisions of the Railway Labor Act, 45 U.S.C., Section 153 First (q), together with the Opinion of the Board setting forth the grounds for the award dated January 17, 1977; and the Court having further considered the pleadings, briefs and affidavits submitted in this action; and this matter having come on for oral argument before the Court on Tuesday, October 11, 1977 in the presence of Stryker, Tams & Dill, Esqs., attorneys for defendants (John C. Lifland, Esq. and Paul M. Herbst, Esq. appearing) opposing the application of plaintiffs; and the Court after hearing argument of counsel having rendered an oral opinion on the record; and the Court having further determined in accordance with F.R.C.P. Rule 54(b) that there is no just reason for delay in directing the entry of final judgment with respect to the above enumerated applications of plaintiffs which are subject to review as provided in 28 U.S.C., Section 1291; and for other good cause shown,

IT IS on this 6 day of December, 1977.

ORDERED AND DETERMINED THAT:-

1. The applications of plaintiffs be and the same are hereby denied in all respects.

2. The award of the Board dated June 17, 1977 be and it hereby is affirmed in all respects pursuant to 45 U.S.C., Section 153 First (q).

3. The aforesaid orders and determinations are without prejudice to the claims for damages by plaintiffs pursuant to the complaint filed in this action, the Court, however, making no determination at this time as to whether loss of back pay would properly be an element of damages under those claims.

/s/ James A. Coolahan
JAMES A. COOLAHAN
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 78-1171

ALBERT M. GONZALEZ, TERESA C. GONZALEZ, his wife, and the INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, an unincorporated association,

Appellants,

vs.

NORTHWEST AIRLINES, INC., a Corporation of the State of Minnesota, JAMES O. SINGER, JAMES A. ABBOTT, ROBERT EBERT and STEVEN D. WHEELER

(Civil No. 76-160, D. of N.J.)

Argued October 6, 1978

Before SEITZ, Chief Judge, HUNTER, Circuit Judge and CAHN, *District Judge.*[*]

After consideration of all contentions raised by the appellants, it is

---

[*] Edward N. Cahn, Judge of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellants.

By the Court,
/s/ Seitz
Chief Judge

Attest:
/s/ Thomas F. Quinn
Clerk

Certified as a true copy and issued in lieu of a formal mandate on November 1, 1978.

/s/ Frances R. Matysek
Deputy Clerk, United States Court of Appeals for the Third Circuit.

Costs taxed in favor of appellees as follows:

Brief $264.60

Dated: October 10, 1978

APPENDIX E

EXCERPTS FROM SECTION 153, FIRST OF THE RAILROAD LABOR ACT, AS AMENDED (45 U.S.C., SECTION 153, FIRST)

"(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute. In case a dispute arises involving an interpretation of the award the division of the Board upon request of either party shall interpret the award in the light of the dispute.

(n) A majority vote of all members of the division of the Adjustment Board eligible to vote shall be competent to make an award with respect to any dispute submitted to it.

(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay to the employee the sum to which he is entitled under the award on or before a day named. In the event any division determines that an award favorable to the petitioner should not be made in

any dispute referred to it, the division shall make an order to the petitioner stating such determination.

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, excepts that on the trial of such suit the findings and order of the division of the Adjustment Board shall be conclusive on the parties, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board: Provided, however, That such order may not be set aside except for failure of the division to comply with the requirements of this Act (45 U.S.C.A., Sections 151, et seq.), for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order.

(g) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this Act (45 U.S.C.A., Sections 151, et seq.), for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of title 28, United States Code (28 U.S.C.A., Sections 1254, 1291).

(r) All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after."

Supreme Court, U. S.
FILED
FEB 21 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1123

ALBERT M. GONZALEZ, TERESA C. GONZALEZ, his wife, and the INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, an unincorporated association,

Petitioners,

vs.

NORTHWEST AIRLINES, INC., a corporation of the State of Minnesota, JAMES O. SINGER, JAMES A. ABBOTT, ROBERT EBERT and STEVEN D. WHEELER,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

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On the Brief:

CHRISTOPHER H. MILTON, ESQ.

IN THE

Supreme Court of the United States

October Term, 1978

No.

ALBERT M. GONZALEZ, TERESA C. GONZALEZ, his wife, and the INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, an unincorporated association,

Petitioners,

vs.

NORTHWEST AIRLINES, INC., a corporation of the State of Minnesota, JAMES O. SINGER, JAMES A. ABBOTT, ROBERT EBERT and STEVEN D. WHEELER,

Respondents.

BRIEF IN OPPOSITION TO A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Respondents pray that this Court deny petitioner's prayer for the issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered herein on October 10, 1978.

TABLE OF CONTENTS

	PAGE
Table of Citations	ii
Counterstatement of the Case	1
Reasons for Denying the Writ	9
Conclusion	25
Appendices	
Appendix A Letter, IAMAW to Arbitrator Turkus, February 6, 1974	A1
Appendix B Telegram, Northwest to Arbitrator Turkus, February 8, 1974	B1

TABLE OF CITATIONS

PAGE

CASES

Baxter v. Palmigiano, 425 U.S. 308, 96 S.Ct. 1551, 47 L.Ed. 2d 810 (1976) 13, 18, 20

DeVita v. Sills, 422 F.2d 1172 (3rd Cir. 1970) 14, 16

Driver v. Helms, 402 F.Supp. 683 (D.R.I. 1975) 16

Gardner v. Broderick, 392 U.S. 273, 88 S.Ct. 1913, 20 L.Ed. 2d 1082 (1968) 13

Garrity v. State of New Jersey, 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed. 2d 562 (1967) 12, 13, 18

Hines v. Anchor Motor Freight, 424 U.S. 554, 96 S.Ct. 1048, 47 L.Ed. 2d 231 (1976) 23

Holodnak v. Avco-Lycoming Div., Stratford, 514 F.2d 285 (2nd Cir. 1975) 24

Lind v. Schmid, 67 N.J. 255 (1975) 22

Local 453, I.U.E. v. Otis Elevator Co., 201 F.Supp. 213 (E.D.N.Y. 1962) 23

Ott v. Board of Education of Hamilton Township, 160 N.J. Super. 333 (App. Div. 1978) 18

Patrick v. Esso Standard Oil Company, 156 F.Supp. 336 (D.N.J. 1957) 20

Perry v. Sindermann, 408 U.S. 593, 92 S.Ct. 2694, S.Ct. 2694, 33 L.Ed. 2d 570 (1972) 20

Peper v. Princeton University Board of Trustees, 77 N.J. 55 (1978) 20

S.E.C. v. Gilbert, 79 F.R.D. 683 (S.D.N.Y. 1978) 16

Shaw v. Riverdell Hospital, 150 N.J. Super. 585 (Law Div. 1977) 17

Slochower v. Board of Education, 350 U.S. 551, 76 S.Ct. 637, 100 L.Ed. 692 (1956) 13

Spevack v. Klein, 385 U.S. 511, 87 S.Ct. 625, 17 L.Ed. 2d 574 (1967) 13

Union Pacific R. Co. v. Price, 360 U.S. 1, 79 S.Ct. 1351, 3 L.Ed. 2d 1460 (1959) 9, 10, 12

PAGE

United States v. Kordel, 397 US 1, 90 S.Ct. 763, 25 L.Ed. 2d 1 (1970) 12, 15, 16

United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed. 2d 1424 (1960) 9

United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed. 2d 1409 (1960) 9

CONSTITUTIONAL PROVISIONS

U.S. Constitution, Fifth Amendment, Due Process Clause 9, 19, 24

U.S. Constitution, Fifth Amendment, Self Incrimination Clause 9, 12, 14, 17

STATUTORY PROVISIONS

N.J.S.A. 2A:102-5 2

N.J.S.A. 2A:111-1 2

Railway Labor Act

45 U.S.C. 153 3

153 First (q) 8, 9, 12

184 3

ARBITRATION DECISIONS

In re Colgate Palmolive Co., 64 L.A. 293 (1975) 22

In re Fawn Engineering Co., 42 L.A. 1185 (1964) 22

In re Jacuzzi Brothers, Inc., 49 L.A. 761 (1967) 21

In re Maintenance Service Corp., 64 L.A. 978 (1975) 22

In re Millage Produce, Inc., 45 L.A. 211 (1965) 21

In re Steel Warehouse Company, Inc., 45 L.A. 357 (1965) 22

COUNTER-STATEMENT OF THE CASE

During an investigation into the purchase of parts and tools by employees of respondent Northwest Airlines, Inc. ("Northwest") employed at Newark International Airport, a meeting was held between respondent James O. Singer ("Mr. Singer"), the Newark Station Manager for Northwest, and petitioner Albert M. Gonzalez ("Mr. Gonzalez"). During this meeting a tape recorder was used to record the oral statements of those involved. In the course of said meeting Mr. Gonzalez was unable to explain the purpose of certain purchases of parts and tools in certain transactions where he had signed the pertinent purchase order or invoice or both.

On July 30, 1973 Mr. Gonzalez was discharged by Northwest for the following reason:

> Misuse of company funds whereby you purchased automotive parts, supplies and tools that could not be used on Northwest Airlines' ground equipment, using Northwest Airlines' purchase orders to obtain such items.

On August 1, 1973 Mr. Gonzalez, a member of petitioner International Association of Machinists and Aerospace Workers ("IAMAW") filed a grievance with Singer pursuant to the grievance and arbitration procedures set forth in the applicable collective bargaining agreement between Northwest and IAMAW ("the Mechanics' Agreement"), which grievance challenged Mr. Gonzalez' discharge; on August 14, 1973 Mr. Singer denied the grievance as hearing officer at the first step. On August 25, 1973 Mr. Gonzalez then carried his grievance to the third step pursuant to Article XII(c) of the Mechanics' Agreement (there is no second step provided for in matters involving suspension or discharge). At the third step a one-day hearing was conducted by Edward J. Neppl, Director of Ground Services for Northwest, on September 14, 1973.

On September 20, 1973 defendant Northwest filed a criminal complaint with the authorities which charged petitioner

Gonzalez with taking property under false pretenses, in violation of N.J.S.A. 2A:lll-l; the indictment handed down on January 31, 1974 ultimately charged petitioner Gonzalez with embezzlement in violation of N.J.S.A. 2A:102-5.[1]

Mr. Neppl issued his decision denying the grievance at the third step by a letter dated October 17, 1973.

During the month of October, 1973, respondent Steven D. Wheeler, Esq., Labor Relations Attorney for Northwest, was approached by IAMAW President Charles D. Easley or IAMAW General Chairman Clarence B. Brown, requesting that Northwest allow petitioner Gonzalez to convert his discharge to a resignation. Respondent Wheeler communicated this request to his superiors, Director of Labor Relations James E. Conway and Director of Ground Services Edward J. Neppl. On October 30, 1973 Mr. Neppl advised Mr. Conway that the request of the IAMAW that petitioner Gonzalez be permitted to resign (instead of being discharged) should be granted. This suggestion of Mr. Neppl is contained in an interoffice communication to Mr. Conway dated October 30, 1973. Upon receiving this from Mr. Neppl, respondent Wheeler communicated with IAMAW President Easley and conveyed to him Northwest's willingness to grant the request of the IAMAW to allow petitioner Gonzalez to resign, instead of being discharged. During the early part of November, 1973, respondent Wheeler had conversations with IAMAW General Chairman Brown, repeating Northwest's willingness to accept the IAMAW's earlier request to allow petitioner Gonzalez to resign.[2]

[1] Petitioners argue in their brief that the criminal proceedings and the grievance proceedings were parallel; however, Northwest notes that although the same sets of facts were involved, the presence of elements of the crimes of false pretenses or embezzlement obviously involved issues different from whether or not there was just cause for discharge, the issue being grieved and ultimately arbitrated. Moreover, the standards of proof in the two proceedings were different.

[2] Petitioners' Statement of the Case is in error to the extent it implies that the source of the resignation suggestion was Northwest (See Petition at page 4 thereof).

Following Mr. Neppl's denial of Mr. Gonzalez' grievance at the third step of the grievance procedure and during the period that defendant Wheeler was waiting for IAMAW officials to advise him whether petitioner Gonzalez intended to submit his resignation, the President and General Chairman of the IAMAW submitted the dispute to the NWA-IAMAW System Board of Adjustment by letter dated November 6, 1973. The submission of the dispute by petitioners to the System Board of Adjustment occurred pursuant to the terms of the Mechanics' Agreement, i.e., Article XIII (A), (D), (E) and (G).[3]

On November 6, 1973 Mr. Brown also wrote to petitioner Gonzalez advising him of his opportunity to resign, and further suggesting that Mr. Gonzalez consider whether or not he wished to defer the hearing before the Board until the completion of the criminal proceeding; Mr. Brown also stated that a prompt response "might be important"; after a follow-up letter from Mr. Brown, Mr. Gonzalez finally responded on January 8, 1974, stating that he refused to resign, and that he intended to appear at any hearings, including the hearing before the Board then scheduled for February 14, 1974.

Following the submission of the grievance to the System Board of Adjustment, respondent Wheeler and IAMAW officials, including General Chairman Brown, conferred concerning the selection of a neutral member to hear the grievance for the System Board of Adjustment. Respondent Wheeler and General Chairman Brown agreed that the grievance would be heard on February 14, 1974 in the offices of the mutually-accepted chairman and neutral member of the board, Arbitrator Burton B. Turkus. The agreement to select Mr. Turkus as arbitrator is confirmed by several letters between respondent Wheeler and Arbitrator Turkus and between respondent Wheeler and IAMAW General Chairman Brown or President Easley.

[3] This is essentially arbitration by the IAMAW and Northwest of the grievance of Mr. Gonzalez, pursuant to the Railway Labor Act, 45 U.S.C. §§184 and 153 and pursuant to the provisions of Article XIII of the NWA-IAMAW collective bargaining agreement dated November 24, 1972.

On January 21, 1974 respondent Singer testified before the Essex County Grand Jury. On January 31, 1974 that Grand Jury indicted Mr. Gonzalez for embezzlement.

On or about February 8, 1974, respondent Wheeler received at his office a copy of a letter from IAMAW General Chairman Brown dated February 6, 1974 and directed to Arbitrator Turkus. (See Appendix A hereto). This letter set forth petitioners' request that the Board postpone the arbitration of the grievance from its scheduled date of February 14, 1974, setting forth various reasons for the request: (1) advice of counsel appearing for petitioner Gonzalez in the criminal matter; (2) advice of IAMAW's counsel that it seemed more appropriate to see whether the burden of proof in a criminal proceeding could be met, and (3) a need to conduct certain research and investigation.

Upon receipt of the February 6, 1974 letter from Mr. Brown, defendant Wheeler sent a telegram to Arbitrator Turkus protesting postponement of the arbitration requested by the IAMAW and moving the Board "for a ruling that no claim by the grievants for back wages or benefits [will] be valid or collectible for the period after February 14, 1974." (See Appendix B hereto)[4] Subsequent to the receipt of Mr. Brown's letter of February 6, 1974 and respondent Wheeler's telegram of February 8, 1974, Arbitrator Turkus sent a letter dated February 11, 1974, granting the IAMAW's request for postponement of the arbitration *sine die*. The letter did not refer to respondent Northwest's position as to limitation of back pay.

Following the postponement of the arbitration proceedings at the request of the petitioner IAMAW, Mr. Wheeler wrote a letter to IAMAW General Chairman Brown stating that respondent Northwest was available to present its case before Arbitrator Turkus on several dates in March and April, 1974. Mr. Brown replied "belatedly" that he would forward Mr. Wheeler's letter to petitioner Gonzalez. Respondent Wheeler

[4] While the text of the telegram contained a typographical error stating the year as 1973, the context makes it clear that 1974 was intended.

received no further response to his request to proceed with arbitration.

Also following the postponement of arbitration, respondent Wheeler had several discussions with IAMAW General Chairman Brown, in which Mr. Brown agreed that Arbitrator Turkus would retain jurisdiction over the grievance of petitioner Gonzalez and took the position that Mr. Turkus would be presented with said grievance upon resolution of the criminal charges pending against petitioner Gonzalez in the state courts of New Jersey. However, respondent Northwest did not abandon its position that the arbitration should proceed as soon as possible. Indeed the notations on the docket sheet prepared by the IAMAW show that the IAMAW's contrary position was the cause of the delay of proceedings before the Board.

By letter of December 2, 1974, Arbitrator Turkus inquired as to the status of the grievance of petitioner Gonzalez. Mr. Wheeler replied to Arbitrator Turkus in a letter dated December 10, 1974 that respondent Northwest was prepared to proceed to arbitration and that the arbitration process was not abandoned in any way. IAMAW General Chairman Brown wrote to Arbitrator Turkus in a letter dated December 17, 1974 that the IAMAW preferred to hold the grievance of petitioner Gonzalez in abeyance until all criminal charges against petitioner Gonzalez had been resolved. Further correspondence in April and June of 1975 reflects that the desire of Northwest to pursue arbitration and the desire of petitioner to delay arbitration both remained unchanged.[5]

In late May or early June, 1975, respondent Wheeler was notified by Essex County Assistant Prosecutor Barry Siegel that the criminal prosecution of plaintiff Gonzalez was scheduled for trial in late June, 1975. The trial later was postponed and reset for September 8, 1975. Prosecutor Siegel advised Mr. Wheeler that he wished defendant Wheeler to assist him in preparing the criminal prosecution by coordinating the availability of wit-

[5] Indeed the Board's opinion incorporates a finding that respondent Northwest was "ready to proceed with the arbitration".

nesses that might testify at trial. Mr. Wheeler agreed to assist Assistant Prosecutor Siegel and therefore traveled to Newark, New Jersey on or about September 7, 1975, assisting the Prosecutor during the trial.

Following the acquittal of petitioner Gonzalez on September 19, 1975, Mr. Wheeler contacted IAMAW General Chairman Brown concerning the scheduling of Mr. Gonzalez' grievance before Arbitrator Turkus. Defendant Wheeler also had a telephone conversation with IAMAW President Easley in late November or early December of 1975, wherein Mr. Easley agreed to proceed with Mr. Gonzalez' grievance before the Board of Arbitration chaired by Mr. Turkus. Before certain scheduling problems could be overcome, Union President Easley advised Northwest on January 21, 1976 that the IAMAW would not be ready to proceed before the Board until there was "no further prospect of court or legal action of any sort relative to Mr. Gonzalez."

On January 26, 1976 the instant suit was filed.

Petitioner Gonzalez and IAMAW filed the instant suit against Northwest and several employees of Northwest, namely, James O. Singer, James A. Abbott, Robert Ebert and Steven D. Wheeler.[6] Plaintiffs sought, *inter alia,* (1) a permanent injunction against arbitration before the System Board of Adjustment of the grievance arising out of the discharge of Mr. Gonzalez, (2) immediate reinstatement of Mr. Gonzalez, and (3) compensatory and punitive damages for alleged deprivation of the civil rights of Mr. Gonzalez, for alleged deprivation of the Seventh and Fourteenth Amendment rights of Mr. Gonzalez, for alleged malicious prosecution of Mr. Gonzalez and for alleged defamation of Mr. Gonzalez.[7]

[6] As the four individual defendants have no direct interest in the matter before this court, further references to them have been minimized.

[7] Petitioners since have sought to add a count charging respondents with negligent management.

By Order to Show Cause also filed on January 26, 1976, petitioners also sought a preliminary injunction against the arbitration of Mr. Gonzalez's grievance, which grievance had been submitted by petitioners to the System Board of Adjustment by letter dated November 6, 1973. A hearing concerning the Order to Show Cause seeking the preliminary injunction was had before the Honorable Frederick B. Lacey on March 2, 1976, and a rehearing was held on March 16, 1976. Petitioners sought in their application for a preliminary injunction, *inter alia:* (a) immediate reinstatement of Mr. Gonzalez as Crew Chief of the Plant Maintenance Department at the Newark Station of Northwest with full seniority and welfare rights dating back to his first date of employment with Northwest; (b) an injunction against any arbitration proceeding based on the same factual circumstances concerning which a verdict of not guilty was rendered in the criminal trial of *State of New Jersey v. Albert M. Gonzalez;* and (c) alternatively, immediate but provisional reinstatement of Mr. Gonzalez as Crew Chief of the Plant Maintenance Department at the Newark Station of Northwest, pending the decision of the Arbitrator under the provisions of the Agreement between Northwest and the IAMAW and the confirmation or vacation by the district court of any arbitration award made as the result of such hearing. Petitioners' application for injunctive relief was denied in its entirety by the District Court in an Order filed June 3, 1976. Said Order explicitly directed that the grievance filed by the petitioners concerning the discharge of Mr. Gonzalez proceed immediately to arbitration before the NWA-IAMAW System Board of Adjustment in accordance with the provisions of the Mechanics' Agreement in existence on July 30, 1973, the date of Mr. Gonzalez's discharge. Arbitration actually commenced on May 3, 1976, prior to the entry of the Order formally directing arbitration.

At the first day of the hearings before the Board, counsel for the petitioners and counsel for Northwest stipulated that the proceedings before the Board were "without prejudice to the allegations Mr. Gonzalez has made in [his] complaint".

The award of the NWA-IAMAW System Board of Adjustment was rendered on January 17, 1977. This award reinstated Mr. Gonzalez to employment on or before January 24, 1977 without loss of seniority, but with back pay only from July 30, 1973 until March 15, 1974. Petitioners endorsed the award insofar as it reinstated Mr. Gonzalez, but objected to the money portion of that award. The Board had concluded that the "unduly excessive" delay in proceeding to arbitration could not be charged to Northwest (See Petitioners' Appendix at page A15), and that granting full back pay for the period which had elapsed between the discharge and reinstatement might allow Gonzalez to profit unfairly at the expense of Northwest (See Petitioners Appendix at page A14). Accordingly, the Board limited back pay to the period from his discharge on July 30, 1973 to March 15, 1974, the date on which the Board found the arbitration could have been decided had it proceeded to hearing as scheduled on February 14, 1974. (See Petitioners' Appendix at page A15).[8]

Petitioners accepted that portion of the award that reinstated Mr. Gonzalez to his employment at Northwest. However, petitioners brought a motion before the District Court on April 18, 1977 to upset the money portion of the same award so as to recover back pay for the entire period of the delay, and for certain ancillary relief pursuant to the Railway Labor Act, specifically 45 U.S.C. §153 First (q). The District Court after argument delivered an oral opinion (see Appendix B to Petition for Certiorari), denying all of the relief sought by petitioners, thus affirming the award entered by the System Board of Adjustment in its entirety. Said denial was reflected in the Order and Final Judgment filed in this matter on December 6, 1977 (see Petitioners' Appendix C).

A Notice of Appeal to the United States Court of Appeals for the Third Circuit was filed by petitioner on January 5, 1978 as to the denial of relief and the concomitant affirmance of the

[8] Indeed in their post-arbitration brief petitioners themselves hypothesized that a decision would have issued by April 30, 1974.

Board's award "in all respects." On October 10, 1978, the Third Circuit Court of Appeals affirmed the decision of the District Court without opinion.

REASONS FOR DENYING THE WRIT

I. Mr. Gonzalez' Rights under the Self Incrimination Clause Were Not Violated by the System Board of Adjustment.

Petitioners argue that Mr. Gonzalez' exercise of constitutional rights under the self-incrimination and due process clauses of the Fifth Amendment was penalized by the Board's limitation of back pay during the period attributable to the adjournment of the arbitration proceedings sought by Mr. Gonzalez. In the lower courts petitioners also argued that the Award was not "conclusive" within the meaning of pertinent provisions of the Railway Labor Act, because the statutory standards for vacating the Award under 45 U.S.C. §153 First (q) were applicable.[9] Petitioners have not sought to press these arguments in their Petition, although the Petition does contain certain references to the irrationality of the limitation of back pay, and therefore the Award is entitled to the binding effect usually accorded such arbitration awards, *Union Pacific R. Co.* v. *Price*, 360 U.S. 601, 79 S.Ct. 1351, 3 L.Ed.2d 1460 (1959); *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596, 80 S.Ct. 1358, 4 L.Ed. 2d 1424 (1960); *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960), unless a valid constitutional attack on the proceedings

[9] 45 U.S.C. §153 First (q) states in pertinent part:

> On [judicial review] the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of [the Railway Labor Act], for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order.

before the Board can be made. *Union Pacific R. Co.* v. *Price, supra*, 360 U.S. at 616.

Petitioners argue primarily that the Board's award is constitutionally invalid in that it allegedly constituted the "automatic imposition" of a penalty upon petitioner Gonzalez for exercising his privilege against self-incrimination (See Petition at page 11). Petitioners articulate this argument for the first time in their Petition; in the courts below the alleged automatic burden was the threat that the arbitrator would draw adverse inferences from the failure to testify at the hearing. Respondents respectfully submit that this Court should not entertain this new argument as the lower courts have not had an opportunity to address it.

Considering first the factual inadequacies of this argument, this invocation of the privilege is in fact an afterthought on the part of petitioners; in their February 6, 1974 request for postponement of the arbitration hearing, no mention was made of any desire to avoid self-incrimination (See Appendix A to this brief).[10] Moreover, Mr. Gonzalez never proceeded to a stage in either the criminal or arbitration proceeding at which he was faced with the choice of asserting his Fifth Amendement privilege, and in fact never claimed such privilege in either proceeding, testifying fully and freely in both. Thus it appears that when Mr. Gonzalez through the IAMAW unilaterally demanded adjournment of arbitration before the criminal trial began and until it ended, it was motivated by other factors, such as convenience, conservation of resources and strategy. In spite of this unilateral delay, obtained over Northwest's explicit

[10] While the Board did find that the purpose of the adjournment was to avoid "the possibility of [Mr. Gonzalez'] testimony at the arbitration being used against him in the criminal case," this decision well may have been motivated by strategic considerations, such as a desire on the part of Mr. Gonzalez to conceal his factual defenses (explanations, alibis, etc.) until the criminal trial, rather than by any desire to avoid self-incrimination. Thus petitioners' entire constitutional argument is based on an alleged "exercise" of the privilege which is not clearly discernible in the relevant document, *i.e.* the letter of February 6, 1974.

objection regarding back pay, petitioners argue that Northwest should pay an immensely increased back-pay award to Mr. Gonzalez.

Furthermore it must be emphasized that Mr. Gonzalez' alleged "exercise" of the privilege was not the usual exercise of the privilege; for Mr. Gonzalez did not take the stand at the arbitration hearing and then invoke the privilege in response to those questions, if any, whose answers might have tended to incriminate him. Rather Mr. Gonzalez' "exercise", assuming *arguendo* that the February 6, 1974 letter was motivated by a desire to avoid self-incrimination, was really no more than an effort to secure a ruling that would preclude his having to make the decision of whether or not to exercise his privilege in the usual manner described above. Thus respondents submit that the alleged "exercise" was not in fact an exercise at all, and should not be the basis for the constitutional arguments raised by petitioners.

The most basic flaw in petitioners' reasoning is that they cannot demonstrate that any penalty (threatened or imposed) was automatic from a factual standpoint. First, a grievant's failure to testify at arbitration does not automatically result in the arbitrator's drawing an inference of grievant's guilt. Indeed Chairman Turkus commented in the award that plaintiff Gonzalez acted "wisely" in requesting a postponement so as to avoid "the possibility of his testimony at the arbitration being used against him in the criminal case." (See Appendix A to Petition at page A14). Presumably Chairman Turkus would have found the same avoidance of the possibility "wise" had the hearing proceeded in February, 1974 as scheduled and had plaintiff in fact exercised his privilege; thus there is little basis for arguing that a proper exercise of the Fifth Amendment privilege would have been fatal to plaintiff's attempt to overturn his discharge. If anything the award seems to state that Arbitrator Turkus would have understood the reasons for the exercise, and it is possible that the petitioner might not even have suffered the "burden" of an adverse inference being drawn against him. Thus petitioner not only cannot demonstrate that an automatic penalty in that regard was imminent,

he cannot even demonstrate that any penalty was probable. Second, the ultimate limitation of back pay was not "automatic", but reflected the arbitrator's balancing of the equities of both parties, a balancing which might well yield different results in different circumstances, and a balancing which is entitled to conclusive weight absent a finding that the standards for vacating the award contained in 45 U.S.C. §153 First (q) are met. *Union Pacific R. Co.* v. *Price, supra.* For example, petitioners seek this increased back-pay award even though Arbitrator Turkus found that Mr. Gonzalez attempted to profit at Northwest's expense by delaying the arbitration and increasing damages by self-interest and inordinate delay. See Appendix A to Petition at page A14. Thus the factual context within which petitioners make their constitutional arguments bears little relationship to that which one would expect to underlie such arguments, and renders the question presented in the Petition inapposite from a factual standpoint.

Turning to the legal aspects of petitioners' arguments, petitioners seek to persuade this Court to grant *certiorari* by arguing that there is "no reported decision on point," and that the lower courts seriously misinterpreted this Court's holding in *United States v. Kordel,* 397 U.S. 1, 90 S.Ct. 763, 25 L.Ed. 2d 1, (1970). Respondents respectfully submit that these legal arguments too are misguided. First, while there is no prior decision of this Court in any case whose precise factual pattern matches the one at bar, prior decisions of this Court have expounded at length upon the principles one is to apply in determining whether or not a given burden placed upon one's exercise of the Fifth Amendment privilege against self-incrimination is constitutionally impermissible. Indeed the decisions in this area are uniform in their conclusion that in a civil context (such as the arbitration proceedings under attack here), only those penalties which are automatic upon assertion of the privilege and are capable of coercive effect are invalid. See, *e.g., Garrity v. State of New Jersey,* 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed. 2d 562 (1967) where police officers had been compelled to testify at the risk of incriminating themselves in

order to avoid forfeiture of their job by virtue of a New Jersey statute providing for job forfeiture upon mere refusal to testify or invocation of the privilege against self-incrimination. *See also, Slochower v. Board of Education,* 350 U.S. 551, 76 S.Ct. 637, 100 L.Ed. 692 (1956) where the Court held that mere invocation of the privilege before a congressional committee could not be the sole basis for discharge; *Spevack v. Klein,* 385 U.S. 511, 87 S.Ct. 625, 17 L.Ed. 2d 574 (1967), where the Court held mere refusal to testify by reason of the privilege could not support disbarment; and *Gardner v. Broderick,* 392 U.S. 273, 88 S. Ct. 1913, 20 L.Ed.2d 1082 (1968), where the Court held mere refusal to waive his entitlement to immunity upon invoking the privilege could not justify discharge of a police officer pursuant to provisions of the New York City Charter.

While the foregoing cases have uniformly struck down as constitutionally impermissible clearly coercive burdens flowing automatically from the mere exercise of the privilege, this Court has stated clearly that less coercive burdens may be constitutionally permissible even if automatic. Moreover, if the burden is not automatic, the relationship between the exercise and the burden is too weak to bespeak coercion. Thus in *Baxter v. Palmigiano,* 425 U.S. 308, 96 S. Ct. 1551, 47 L.Ed. 2d 810 (1976) this Court ruled that the mere drawing of an adverse inference from the silence that results from invocation of the privilege is not constitutionally impermissible in a civil, as opposed to criminal, context. Distinguishing the *Garrity* line of decisions in reaching the *Baxter* decision, this Court stated:

> There, failure to respond to interrogation was treated as a final admission of guilt. Here, Palmigiano remained silent at the hearing in the face of evidence that incriminated him; and, as far as this record reveals, his silence was given no more evidentiary value then was warranted by the facts surrounding his case. This does not smack of an invalid attempt by the State to compel testimony without granting immunity or to penalize the

exercise of the privilege. . . .The advice given inmates by the decisionmakers is merely a realistic reflection of the evidentiary significance of the choice to remain silent. . . .

Our conclusion is consistent with the prevailing rule that the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them: the Amendment "does not preclude the inference where the privilege is claimed by a party to a *civil cause.*" [Emphasis in text; p. 319]

Thus the prior decisions of this Court make clear that only substantial and coercive burdens (*e.g.*, discharges) resulting automatically from the mere exercise of the privilege are impermissible, and that lesser burdens such as the drawing of adverse inferences will be permitted even if automatic so long as not overly coercive.

Indeed respondents respectfully submit that lower courts are not having any difficulty in applying the teachings of the foregoing cases to situations involving simultaneous civil and criminal proceedings arising from the same set of facts. Thus in *DeVita v. Sills,* 422 F.2d 1172 (3rd Cir. 1970), the plaintiff judge sought an adjournment of a civil disciplinary proceeding against him until the completion of a criminal prosecution against him arising out of the same facts. Rather than continue with the civil proceeding and risk the chance that he would have to assert his Fifth Amendment privilege in order not to incriminate himself, Judge DeVita, like petitioner Gonzalez, sought an adjournment of the entire civil proceeding until the outcome of the criminal trial. The Third Circuit held this argument specious and ordered the judge to go forward in the civil disciplinary proceeding.

"But, says the plaintiff, I will nevertheless be put to a difficult situation, and the Fifth Amendment should be so construed that one is not faced with the compulsion to add his own possibly affirmative good impression to weight of

evidence in the disciplinary hearing before the criminal trial." [422 F.2d at 1178]

The Court of Appeals gave no credence to this argument, even though it involved possible suspension of a judge of this state, his possible removal from the bench and possible disbarment, with consequent effects on his property. The Third Circuit's response to such reasoning was:

"*This argument proves too much, for it applies with equal force to every situation where civil and criminal proceedings may arise out of the same factual pattern.* If, for example, the charge against an attorney was embezzlement of a client's funds, acceptance of plaintiff's position would require that the wronged client await the completion of a criminal trial before he sought a civil recovery, because of the possible compulsion of the risk of a judgment. The same would be true of every defendant in a wrongful death action; of many taxpayers; of most antitrust defendants. . . *No authority has come to our attention for so broad a reading of the Fifth Amendment, and the countervailing possibilities of prejudice to civil litigants militates against any such extension of constitutional doctrine.*" [422 F.2d at 1178; emphasis supplied]

The contention that an actual or potential defendant in a criminal case should not even be put to a difficult choice of having to assert the privilege in a related civil case had been earlier rejected by the United States Supreme Court in *United States v. Kordel,* 397 U.S. 1, 90 S. Ct. 763, 25 L.Ed. 2d 1 (1970), reversing the lower court:

"In this analysis we think the court erred, for Feldten need not have answered the interrogatories. Without question he could have invoked his Fifth Amendment privilege against compulsory self-incrimination. Surely Feldten was not barred from asserting his privilege simply because the corporation had no privilege of its own, or because the proceeding in which the Government sought

information was civil rather than criminal in character." [90 S.Ct. at 767]

The Third Circuit in *DeVita v. Sills, supra,* reached the same result as this Court in *Kordel,* stating that the plaintiff could, if he wanted, assert the privilege in the civil proceeding but that "he has no constitutional right to be relieved of the burden of that choice." *DeVita v. Sills, supra* , 422 F.2d at 1180.

In *Driver v. Helms,* 402 F. Supp. 683, 685-686 (D.R.I. 1975), the court held that even though certain of the defendants were subjects of a criminal investigation, the court would not stay the civil proceedings against defendants based on the same facts, despite allegations that some defendants might assert their Fifth Amendment protections:

> "[the defendants] can, of course, object to depositions or interrogatories directed against them in any civil action where the answers might incriminate [them] in a pending criminal case. . .But the contention that an actual or potential defendant in a criminal case should not even be put to the difficult choice of having to assert the privilege in a related civil case was rejected in *United States v. Kordel,* 397 U.S. 1 (1970)."

So too in *S.E.C. v. Gilbert,* 79 F.R.D. 683 (S.D.N.Y. 1978) the court in a civil context considered a defendant's right to a protective order until the termination of a parallel criminal proceeding, and ultimately denied such relief, holding that the mere possibility of raising an adverse inference did not constitute the kind of burden which the Supreme Court previously had invalidated:

> Accordingly, we conclude that as long as the only immediate sanction for refusal to testify is, as here, the possible raising of an adverse inference which would not, standing alone, support a finding of liability, then the spectre of loss of employment, which even a finding of liability would not automatically cause, does not put Streicher to an unconstitutionally coercive choice. [79 F.R.D. at p. 686]

The issue of the effect of the privilege upon a request for the adjournment of a civil proceeding until the conclusion of a criminal trial involving the same facts has been treated recently by the New Jersey courts in *Shaw v. Riverdell Hospital,* 150 N.J. Super. 585 (Law Div. 1977). Defendants there sought to have the civil case placed on the inactive list pending the outcome of the related criminal matter. The defendant physician argued that, if the civil action were to proceed prior to a final disposition of the criminal case, an unconstitutional burden would be placed upon his exercise of his privilege against self-incrimination under the Fifth Amendment. The court denied the defendant physician's motion to adjourn the civil proceedings pending the outcome of the criminal trial, and offered several reasons for its decision. Initially, the court observed that, as here, neither the criminal nor the civil trial had yet progressed to the point where the defendant was required to decide whether or not to assert his Fifth Amendment privilege. Consequently, the court found that the defendant's motion to stay the civil litigation was prematurely filed. The court also stated that the privilege against self-incrimination is not infringed, nor too high a price exacted for its exercise, when a criminal defendant is put to a difficult choice of whether or not to assert the privilege in a related civil case. The court further stated that its reason for refusing to stay the civil litigation was not to intentionally curtail the exercise of the defendant's rights against compulsory self-incrimination, but rather to insure that substantial justice was effected and that plaintiffs there be given their day in court without further inordinate delay. Thus, the court's decision emanated from an attempt to effect substantial justice among all the litigants:

> "Hence, any pressure brought to bear as a result thereof will be sufficiently attenuated so as not to be an unconstitutional penalty in that it served a purpose other than simply to discourage the defendant from exercising his constitutional right. [150 N.J. Super. at 590]

Finally, in *Ott v. Board of Education of Hamilton Township,* 160 N.J. Super. 333 (App. Div. 1978) the New Jersey court addressed the right of a teacher, who sought to enjoin disciplinary proceedings against him pending the resolution of parallel criminal proceedings, to receive his salary during the period of the injunction. The court granted an injunction under its equitable powers, and denied the salary during the period of the injunction, relying in part on basic equitable principles:

> In view of this expression of legislative intent and the application of basic equitable principles, we conclude that plaintiff's application for the restraint of the disciplinary process for his own purposes and protection bars him from entitlement to the continued receipt of his salary in the meantime. *Since his action has produced the delay the board should not be compelled to continue to pay his salary while unemployed.* A contrary conclusion would reward him with receipt of salary without service during the pendency of the criminal charge and the potential extensive delay in its disposition. In the absence of such criminal involvement, on the other hand, the board could suspend his salary for 120 days within which the Commissioner would be able to dispose of the charge. Plaintiff should not be in a better position because the infraction involves a crime than that which would obtain if the charge were noncriminal. *Since the delay is brought about by him and his interest, the board should not be burdened with interim salary payments.* Of course, in the ultimate, if plaintiff is cleared of the disciplinary charges, he will be entitled to reinstatement with full back salary.[11]

What is clear from the foregoing analysis is that the guidance given by this Court in the *Garrity* line of decisions and the *Baxter* decision has proved a workable framework for analysis of what is a constitutionally permissible burden in this context.

[11] This final statement, although *dictum,* was mandated by a New Jersey statute which appeared to require payment of full back salary to a reinstated teacher.

Thus it is apparent that petitioners are not in a position to make the factual showing required under prior decisions. Not only did Mr. Gonzalez not "exercise" the privilege, but he cannot demonstrate that the burden was imposed automatically, because the limitation of back pay here was the result of Board's proper exercise of its discretion in balancing the equities of the litigants. Furthermore, the attenuated relationship between any exercise of the privilege and the ultimate limitation of back pay renders it unlikely that the threat of the limitation would coerce any grievant to waive the privilege. Finally, petitioners are not even in a position to argue that the law is unclear or confused. Under all the circumstances, petitioners' questions regarding the self incrimination clause are neither substantial nor novel.

2. Mr. Gonzalez' Rights Under The Due Process Clause Were Not Violated by the System Board of Adjustment.

While petitioners have not articulated clearly their claims with respect to Mr. Gonzalez' rights under the due process clause of the Fifth Amendment, it appears that the argument is principally based on somewhat vague concepts of fundamental fairness. Thus petitioners state: (1) that the imposition of such a penalty where the civil proceeding is one in which discovery is unavailable somehow contravenes due process (See Petition at page 11); (2) that the imposition of a penalty for seeking and obtaining an adjournment to avoid obvious prejudice to Mr. Gonzalez' constitutional rights is inconsistent with the body of law that supports one's entitlement to the adjournment (See Petition at page 12); (3) that this penalty will have a chilling effect on the ability of employees to protect their property rights in employment (See Petition at page 13); (4) that this penalty will have a chilling effect on the ability of union representatives to investigate such matters as this (See Petition at page 13); and (5) that since a conviction would have mooted the necessity for the arbitration, fairness requires that the acquittal in those proceedings entitles the petitioner to full back pay (See Petition at page 14).

Assuming that the foregoing arguments are intended to state bases for finding the penalty invalid that are different from the analysis which petitioners offer under the self-incrimination clause[12], respondents respectfully submit that these arguments do not rise to constitutional dimension. In the absence of questions of constitutional dimension, as was stated above, the Railway Labor Act requires that the Award be conclusive as between the parties on such issues as were addressed by the Board.

Preliminarily it must be noted that the concept of due process is a flexible one which depends on the nature of the deprivation and policy considerations related to the proceedings leading up to the deprivation. Thus while the authority cited by petitioners has accorded certain due process rights in certain narrow circumstances, *e.g., Perry v. Sindermann,* 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed. 2d 570 (1972), the final determination of what process is "due" in given circumstances must depend on individualized analysis of the foregoing factors.[13] Therefore it is most unlikely that this case will provide any meaningful precedent for future arbitrators faced with the task of balancing equities.

Petitioners argue that the fact that the Board has "no formal rules of procedure to compel discovery of testimony or documents" enhanced the pressures on Mr. Gonzalez to testify before the Board.[14] While petitioners raise this argument for

[12] Even if this is not so, this Court in *Baxter v. Palmigiano, supra,* already has rejected the due process argument that is based on essentially the same analysis.

[13] Petitioners' citation of *Patrick v. Esso Standard Oil Company,* 156 F.Supp. 336 (D.N.J. 1957) and *Peper v. Princeton University Board of Trustees,* 77 N.J. 55 (1978) is inappropriate, as any constitutional dimension accorded employment in those cases was under the New Jersey, not federal constitution.

[14] Petitioners also argue in support of this point that this Court should grant *certiorari* because the employee is usually represented by a union agent untrained in law. While respondents disagree that there is any inbalance in representation, this is not a proper case to address such issues, as Mr. Gonzalez has been represented at the criminal trial, the arbitration and in his civil action by counsel prosecuting this very Petition.

the first time in this Court, it seems clear that the need for economical and speedy resolution of labor disputes in the transportation industry, which need underlies the entire legislative establishment of special mechanisms in this area, clearly justifies depriving the parties of certain discovery techniques. Petitioners here retained several procedural advantages which would have mitigated the impact of the absence of discovery: (a) the burden of proof and of going forward were both placed on Northwest during the proceedings before the Board; (b) pursuant to certain provisions of the Mechanics' Agreement the Chairman of the Board is obligated to "guide the parties in the presentation of testimony, exhibits and arguments at hearings to the end that a fair, prompt and orderly hearing of the dispute is afforded";[15] (c) the parties have the right to "call any witnesses who are employed by the Company and who may be deemed necessary by the parties to the dispute, or by either party;"[16] and (d) petitioners were accorded a full hearing on this matter, including an opportunity to cross-examine Northwest's witnesses and to take depositions of third party witnesses. Quite clearly the procedural protections afforded Mr. Gonzalez would have permitted him to maintain a defense without his testifying on matters that might incriminate him.

As to petitioners' contention that the limitation of back pay is somehow inconsistent with the granting of the adjournment, it must be emphasized first of all that the risk of such a limitation where a grievant delays a proceeding is well established in published arbitral decisions. Indeed, arbitrators often have limited back pay awards where delay in arbitration has occurred. See, *e.g., In re Jacuzzi Brothers, Inc.,* 49 L.A. 761 (1967) where a union requested suspension of all arbitration proceedings during (1) collective bargaining and (2) a several month long strike, and where there was a post-strike delay by the union in reviewing the grievance to decide whether to proceed to arbitration. See also *In re Millage Produce, Inc.,* 45 L.A. 211 (1965) where an arbitrator limited back pay in the

[15] Mechanics' Agreement, Article XIII (F).

[16] Mechanics' Agreement, Article XIII (I).

face of the unexplained delay of the parties in proceeding to arbitration. Similar decisions limiting back pay exist where there is a delay in filing a grievance by the grievant or the union, a situation analogous to delay in arbitration. *In re Colgate Palmolive Co.*, 64 L.A. 293 (1975); *In re Maintenance Service Corp.*, 64 L.A. 978 (1975); *In re Steel Warehouse Company, Inc.* 45 L.A. 357 (1965); and *In re Fawn Engineering Co.*, 42 L.A. 1185 (1964). Furthermore, as the Board and the District Court noted in this matter, and as noted by the New Jersey Courts in the *Ott* case, *supra*, fairness demands that the burden engendered by a delay should be borne by the one seeking the adjournment. While petitioners doubtless would counter with the argument that an adjournment would not have been necessary without Northwest's initiation of criminal proceedings, the public policy of New Jersey favoring the filing of criminal charges when probable cause exists would seem to preclude such an argument. *Lind v. Schmid*, 67 N.J. 255, 262 (1975).

Petitioners' arguments regarding the possible chilling effects of the award below also are misguided. While the practical effect of the ruling below may be to make it more difficult for one to defend oneself in disciplinary or arbitral proceedings, it would not seem likely to discourage employees altogether from attempting to preserve their employment. On the other hand, the ruling limiting back pay confers on the employer what it is fairly entitled to, namely, relief from burdensome back pay awards in a civil context where the employee seeks an adjournment for his protection in the criminal forum and is thus the true beneficiary of the delay. Indeed the logical extension of petitioners' argument is that any employee who seeks to justify an adjournment by reason of his privilege is entitled automatically to full back pay. In practice such a rule of law would permit any employee to obtain a huge back pay award, even where the real motivation for seeking the adjournment lay far from the Fifth Amendment. Such an effect would be most inequitable and would deprive the employer of fundamental fairness. Thus no fixed principle is appropriate in

this area, the arbitration forum being capable of determining what is equitable on a case by case basis.

As to petitioners' argument that the ruling would have a chilling effect on the ability of a union to appropriately investigate matters, respondent Northwest submits that this tenuous argument was not raised in the District Court and should not be entertained on appeal, absent exceptional circumstances. In any event this argument is clearly frivolous. First, the request for an opportunity to investigate the factual background of the grievance was made on February 6, 1974, more than five months after the grievance was filed. Certainly a limitation of back pay where a union has delayed its investigation for so many months would not chill any union timely moving to satisfy its investigatory obligation imposed under *Hines v. Anchor Motor Freight*, 424 U.S. 554, 96 S.Ct. 1048, 47 L.Ed. 2d 231 (1976). Indeed it would seem wise for this Court to endorse the concept of limiting back pay in the face of such delay, so as to create an incentive for unions to investigate promptly. Moreover, the duty to investigate under *Hines* exists regardless of the pendency of criminal proceedings. Finally, reasonable and timely postponements in order to investigate presumably would not be penalized by arbitrators.

Finally, citing *Local 453, I.U.E. v. Otis Elevator Co.*, 201 F.Supp. 213 (E.D.N.Y. 1962), petitioners argue that Northwest had much to gain from a criminal conviction, as this would render arbitration unnecessary as a matter of public policy, and further argue that fairness thus requires full back pay after acquittal. However, these arguments do not square with the facts, because Northwest constantly pressed for arbitration *prior* to the criminal trial of plaintiffs. Northwest repeatedly sought arbitration more than 19 months before plaintiff's criminal trial began, and continued to press for arbitration up to the time of the criminal trial. Certainly, if defendant Northwest stood to benefit so extensively from the criminal trial, then it would have agreed with plaintiffs to postpone arbitration until after the criminal proceedings. The opposite occurred, with petitioners

requesting the adjournment to see if the criminal standard of proof might be met. See Appendix A hereto. This pressure by defendant Northwest for arbitration as early as possible, and before the criminal trial, in order to resolve the labor dispute is irrefutable proof that defendant Northwest was not seeking any ulterior advantage from filing criminal proceedings against plaintiff Gonzalez.[17] In any event the advent of the Speedy Trial Act and its state law analogs to a large extent will prevent any employer from seeking such an advantage in the future.

Thus respondents respectfully submit that petitioners' rights to due process under the Fifth Amendment were in no way infringed by the imposition of the limitation of back pay. The limitation itself not only is consistent with fundamental fairness, but it reflects the Arbitrator's well supported finding that under all circumstances, the delay was attributable to plaintiff, and his further conclusion that it would be inequitable as a matter of law to visit the burdens engendered by this delay upon respondents. There being no unconstitutional deprivation of Mr. Gonzalez' due process rights, this Court should not disturb the decision of the Board.

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[17] Petitioners also cite the decision in *Holodnak v. Avco-Lycoming Div., Stratford,* 514 F.2d 285 (2nd Cir. 1975) as authority for the proposition that anything less then full back pay is inappropriate. This argument puts the cart before the horse, for as petitioners themselves state, that decision followed a finding that the employer had deprived the employee of *constitutional* rights, which finding was not part of the *ratio decidendi;* of the Board in this case.

CONCLUSION

For all the foregoing reasons, respondents respectfully request that the petition for a writ of certiorari in this matter be denied.

Respectfully submitted,

STRYKER, TAMS & DILL

By /s/ JOHN C. LIFLAND

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Attorneys for Respondents

Dated: February 16, 1979

On the Brief:
CHRISTOPHER H. MILTON, ESQ.

APPENDIX A

NORTHWEST DISTRICT LODGE NO. 143

International Association of Machinists and Aerospace Workers
AFL-CIO

4301 EAST 50TH STREET • MINNEAPOLIS, MINN. 55417

February 6, 1974

MR. BURTON B. TURKUS
595 Madison Avenue
New York, New York 10022

RE: Grievance #A1808, Dkt. 73-23, Charles Barbossa
Grievance #10394, Dkt. 73-22, Albert Gonzalez

Dear Mr. Turkus:

According to Charles Barbossa and Albert Gonzalez, individual and separate legal counsel for each has advised them to postpone System Board of Adjustment hearings until court action relative to them has been processed to finality.

Our counsel sees no reason to accelerate the System Board of Adjustment proceedings solely for the benefit of the Company, where, as here, the Company is likewise pressing crinimal charges against these two men. "Clearly, a more appropriate method of proceeding is to determine whether or not there was sufficient proof to warrant criminal prosecution in conformity with the strict rules of evidence rather than to permit the System Board of Adjustment proceedings to progress."

In addition, upon visiting Newark February 4 & 5, there was adequate indication to lead me to conclude that much research and extensive investigation needs to be done, particularly in relation to certain procedures and other goings-on concerned. . . .before the Barbossa and Gonzalez cases are to be heard before the System Board with minimum jeopardy to justice and equity.

Proceeding to the System Board at this time would not be for the benefit of Barbossa and Gonzalez.

Considering the Company had such confidence in its measures against Barbossa and Gonzalez, by not only discharging them from employment but also pressing criminal charges, what possible insecurity to the Company's position could there be wrought by delaying System Board of Adjustment hearings until criminal proceedings have been resolved?

Therefore, February 14 is not a 'practical' time for Dockets 73-22 and 73-23 to be heard before the Board.

During the time Mr. Steve Wheeler and I discussed, and as he says, agreed to requesting your services as the neutral mediator for Dockets 73-22 & 73-23 on February 14, it was emphasized that if Barbossa and Gonzalez were not inclined toward a System Board hearing on that date, we could substitute another docket, citing to Mr. Wheeler at least one by name and number.

In view of our lack of mutual agreement on Barbossa and/or Gonzalez for February 14, are you willing to proceed with an alternate docket, provided the Carrier agrees?

Respectfully & very sincerely,

Clarence B. Brown
General Chairman

CBB/jlg
opeiu #12

cc: S. Wheeler
L. Hesner
C. Barbossa
A. Gonzalez
W. Kozuch

APPENDIX B

005176C039 0953EDT
ZCZC 001 PD St. Paul Minnesota
PMS Burton B. Turkus
595 Madison Ave.
New York, New York 10002
BT

We are in receipt of letter from IAM Chairman C. B. Brown dated 2/6/74 requesting postponement of 2/14/74 hearing. Please consider this as our vigorous objection to the union request. The hearing date has been known for months. The union advised that Mr. Gonzalez approved of the 2/14/74 date, and the company is prepared to present its case. Mr. Barbossa's case was to be heard as soon as possible after 2/14/74. The unions request is untimely and obviously the result of their failure to start preparation of their case until 2/4/74. The company has not "pressed" charges against the two former employees but have merely cooperated with law enforcement officials who initiated the charges. In addition the company never agreed to substituting any other cases. To so do at this late date would prejudice the company's preparation. If the unions request for continuance is to be considered by you then the company moves the board for a ruling that no claim by the grievants for back wages or benefits will be valid or collectible for the period after 2/14/73.

Steven D. Wheeler—Labor Relations Attorney

NNNN

Accepted

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